A **MASTER PYRODOR SDN BHD**

v.

TAI THONG FLOWER NURSERY SDN BHD

B HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[SUIT NO: 22-2-2011]
7 AUGUST 2013

C ***LAND LAW:*** *Trespass - Unlawful occupation - Whether plaintiff's evidence of defendant's trespass unrebutted - Failure of defendant to call witnesses - Submission of no case to answer - Whether plaintiff's case proved on balance of probabilities - Whether defendant's conduct of commercially profiting from trespass attracted award of exemplary damages*

D ***EVIDENCE:*** *Presumption - Due performance of official acts - Presumption of transfer of land - Approval of Estate Land Board - Whether obtained - National Land Code, s. 214A - Refusal to call witness - Submission of no case to answer - Whether adverse inference invoked - Evidence Act 1950, s. 114(g)*

E The plaintiff claimed that the defendant had trespassed onto a portion of its land ('the land') and was running a farm with permanently-constructed structures for the cultivation and sale of plants. The plaintiff averred that it had never given the defendant permission to occupy the land and prayed for vacant possession thereof and for general and/or exemplary damages. *Inter alia*, the defendant disputed the plaintiff's F ownership of the land and denied it had caused any loss or damage to the plaintiff. Although the issue was not pleaded, the defendant alleged that even if the plaintiff's title to the land was proven, it was not indefeasible because the transfer of the land to the plaintiff did not have the prior approval of the Estate Land Board pursuant s. 214A of the G National Land Code ('NLC'). At the close of the plaintiff's case, the defendant submitted that it had no case to answer and called no witnesses on its behalf.

Held (allowing claim and ordering general and exemplary damages to be assessed by Registrar):

H

(1) On a balance of probabilities, the plaintiff had proven that it was the registered owner of the land and that the defendant had trespassed upon it. (paras 40 & 48)

I **(2)** The defendant's conduct in refusing to testify showed that it was not serious in asserting its defence and in raising illegality. The irreversible inference was that the defendant intended to stay for as

long as it could on the plaintiff's land, deprive the plaintiff of the legitimate use of its land and at the same profit from the land for free. Such brazen conduct attracted an award of exemplary damages. (paras 52 & 53)

(3) The defendant's allegation of illegality was not supported by any evidence but was more of an afterthought. The defendant did not raise any counter-claim to declare the plaintiff's title invalid for non-compliance with s. 214A of the NLC. The court would not go behind the title unless a frontal attack against it had been made by the defendant. Given that the Land Office had issued the sub-divided title to the land and registered it in the plaintiff's name, the court would presume under s. 114(e) of the Evidence Act 1950 that all official acts had been regularly performed, including approval from the Estate Land Board for the transfer of the land to the plaintiff. (paras 29, 30, 32, 37 & 38)

(4) The defendant chose not to call any witnesses and as the plaintiff's evidence was not contradicted and was not inherently incredible, it was a fit and proper case for the court to invoke s. 114(g) of the Evidence Act 1950 against the defendant. Either the defendant had no helpful evidence to refute the plaintiff's assertions or it knew for a fact that it had trespassed onto the land. (paras 42 & 47)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Berhad [1995] 4 CLJ 283 FC ***(refd)***

Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors [1999] 3 CLJ 257 HC ***(refd)***

FKJV (M) Sdn Bhd v. Mode Circle Sdn Bhd & Other Cases [2012] 1 LNS 1141 HC ***(refd)***

Frazer v. Walker And Others [1967] 1 All ER 649 ***(refd)***

Hizran Enterprise & Anor v. Kumpulan Sua Betong Sdn Bhd [1994] 3 CLJ 622 HC ***(refd)***

Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA ***(refd)***

Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20; [1992] CLJ (Rep) 150 SC ***(refd)***

Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & 54 Ors [1994] 3 CLJ 64 HC ***(refd)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor [2008] 2 CLJ 369 CA ***(refd)***

Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

Ng Ben Thong & 2 Ors v. Krishnan Arumugam [1997] 1 LNS 85 HC ***(refd)***

Rengamah Rengasamy v. Tai Yoke Lai & Anor [1998] 1 CLJ 987 HC ***(refd)***

RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***

Syarikat Pengangkutan Kesejahteraan Sdn Bhd & Anor v. Tenaga Nasional Bhd; Ng Ah Boon (Third Party) [2010] 1 CLJ 625 HC ***(refd)***

A *Takako Sakoa v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC* ***(refd)***
Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd [2006] 8 CLJ 657 HC ***(refd)***
U N Pandey v. Hotel Marco Polo Pte Ltd [1978] 1 LNS 223 HC ***(refd)***
Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***
B *Wong Yew Kwan v. Wong Yu Ke & Anor [2010] 2 CLJ 703 CA* ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 3, 101, 114(e), (g)
Federal Constitution, art. 13
National Land Code, ss. 214A(1), (10A)(a), 340(1), (2)

C
For the plaintiff - Rajindar Singh Veriah (Reena Kaur Veriah with him); M/s Rajindar Singh Veriah & Co
For the defendant - Chan Kok Keong (Cheang Lek Choy & Lee Yen Lin with him); M/s Chan & Assocs

D *Reported by Ashok Kumar*

JUDGMENT

E **Lee Swee Seng JC:**

[1] The plaintiff is the registered owner of that piece of land held under Geran 34685 No Lot 5585, Mukim Ulu Tenom, Daerah Cameron Highlands, Negeri Pahang (previously held under HS(D) 3805 PT 2279, Mukim Ulu Tenom, Daerah Cameron Highlands, Negeri
F Pahang) ("the said land"). It had entered into a sale and purchase agreement dated 26 February 2007 to purchase the land from the previous registered owner, Cameron Fresh Farms Sdn Bhd. The land was registered in the plaintiff's name in 2009.

G **Problem**

[2] The plaintiff contended that the defendant, its servants and/or agents are illegally and unlawfully occupying a substantial portion of the said land and have built permanent structures on the said land. The defendant is in the business of cultivation and sale of plants. The
H plaintiff further argued that the defendant has no consent to occupy the land, nor any interest, license or any right whatsoever in the said land. In one word the plaintiff said the defendant is a trespasser on its land.

[3] As a result of the defendant's trespassing on the said land, the
I plaintiff is unable to have vacant possession of the said land. Despite numerous demands from the plaintiff through its solicitors, the defendant

has failed and/or refused to vacate the said land. The plaintiff had served a notice dated 10 June 2010 claiming vacant possession against the defendant and another notice through its solicitors dated 13 October 2010.

[4] The defendant on the other hand contended that it had been allowed to use the land as part of its farm by one Mr Ong Eng Chin since 1 July 1973. It denied that the plaintiff is entitled to vacant possession of the part of the land occupied by it. The defendant further argued that the plaintiff has not proved that it is the registered owner of the land and as such it was not reasonable for the defendant to give vacant possession of the land it occupies to the plaintiff. The defendant also denied that the plaintiff has suffered any damage and loss as a result of the its occupation of the land. The defendant also raised the fact that the plaintiff was aware at all material times that the defendant was occupying the land and as such the plaintiff was estopped from claiming any loss or damages from the defendant.

Prayers

[5] The plaintiff has as a result of this suffered loss and damage.

[6] The plaintiff is praying for vacant possession of the said land, general and/or exemplary damages, interest, costs and such further of other relief as this honourable court may deem fit. The plaintiff alleged that the building of the structures on the land was deliberate and for the purpose of providing support to the defendant's cultivation.

[7] There was no counter-claim filed by the defendant challenging the validity of the plaintiff's title to the land.

[8] Parties at the outset agree that the trial shall be on the issue of liability only and that in the event the court finds in favour of the plaintiff, then assessment of damages shall be by the Senior Assistant Registrar (SAR).

[9] Parties also agreed that all the documents in the three bundles of documents filed and marked B, C and D shall be regarded as exhibits and evidence subject only to weight to be attached to them. The bundle of pleadings was marked as bundle A.

Parol Evidence

[10] The plaintiff called its director Dato' Wong Swee Yee (PW1) to testify. He produced the issue document of title to the land. He said that the plaintiff had bought the property from the previous owner by

way of a sale and purchase agreement dated 26 February 2007. The purchase was not subject to any rights of the defendant to occupy the land. The said title does not have the interest of any other person on the land other than the plaintiff as registered owner. The plaintiff had not at any time given consent to the defendant to occupy the land and to build the structures on the land.

[11] Under cross-examination it was suggested to PW1 that the consent of the Estate Land Board had not been obtained. PW1 said he was sure all consent of the relevant authorities had been obtained as he had entrusted it to his solicitors to handle and the title has been registered in the plaintiff's name. The plaintiff did not have vacant possession as it had 'inherited' the problem of the defendant's unlawful occupation from the previous owner. To a question from the court he clarified that the portion occupied by the defendant is more than six acres. He also indicated in the survey plans the portion of the land occupied by the defendant.

[12] After the plaintiff closed its case the defendant submitted no case to answer. The court as usual, issued a caution to the defendant's counsel Miss Lee Yen Lin that by so doing she has elected on behalf of his client that no witnesses would be called even if the decision of the court is not in the defendant's favour.

Principles

Whether The Plaintiff Has Proved On A Balance Of Probabilities That It Is The Registered Owner Of The Land And Entitled To Possession Of It

[13] The elements to be proved by the plaintiff to show trespass by the defendant have been set out in *Terra Damansara Sdn Bhd v. Nandex Development Sdn Bhd* [2006] 8 CLJ 657 p. 665 as follows:

> [9] The tort of trespass to land or what is known as trespass *quare clausum fregit* consists of three significant factors. Firstly, it is the act of entering upon land in the possession of another - here it would be the plaintiff as against the defendant who is the trespasser. Secondly, having entered upon such land the trespasser continues to remain on the land. Thirdly, the trespasser placing or projecting any object upon such land. It must be emphasised that in each case, the entry is without lawful justification (*Barker v. The Queen* [1983] 153 CLR 338, 356).
>
> [11] Trespass to land is actionable *per se* without any proof of damage (*Ashby v. White* [1703] 2 Ld Raym 938). And liability is certainly strict.

[14] Here the plaintiff is claiming possession by virtue of its registered ownership of the land including the portion of the land occupied by the defendant. A registered owner of a piece of land has rights superior to all others who claim to have some unregistered rights of occupation of the land. The fact of the plaintiff's registered ownership of the land cannot be seriously disputed in the issue document of title produced and marked as exh. P1 (bundle D pp. 1-3). It is held under Geran 34685 No Lot 5585, Mukim Ulu Tenom, Daerah Cameron Highlands, Negeri Pahang (previously held under HS(D) 3805 PT 2279, Mukim Ulu Tenom, Daerah Cameron Highlands, Negeri Pahang) and measuring about 8.05 hectare. The part occupied by the defendant had been marked out in red and shaded. The plaintiff's title is indefeasible against the whole world. Section 340(1) of the National Land Code 1965 (NLC) provides:

> Section 340. Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

[15] In *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703 p. 712, the concept of indefeasibility of title was explained as follows:

> It is to be found in s. 340(1) of the National Land Code to which she adverted in her judgment. That section immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s. (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument.

[16] The exceptions to s. 340(1) of the NLC are provided in s. 340(2) as follows:

> (2) The title or interest of any such person or body shall not be indefeasible -
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> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
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> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[17] The meaning and concept "indefeasibility" has been explained with unrivalled clarity in the case of *Frazer v. Walker And Others* [1967] 1 All ER 649 at p. 652 by Lord Wilberforce as follows:

> ... a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. The conception is central in the system of registration. It does not involve that the registered proprietor is protected against any claim whatsoever; as will be seen later, there are provision by which the entry on which he relies may be cancelled or corrected, or he may be exposed to claims *in personam*. These are matters not to be overlooked when a total description of his rights is required; but as registered proprietor, and while he remain as such, no adverse claims (except as specifically admitted) may be brought against him.

[18] The firmness and finality that comes from registration of the title in the name of the owner is the very foundation that cannot be shaken by some assertion of unregistered interest in the land. The court in *Majlis Amanah Rakyat (MARA) v. Tam Seek Hong & 54 Ors* [1994] 3 CLJ 64; [1994] 2 AMR 25; 1296 at p. 1304 captures this concept fully when it observes as follows:

> Under the Torrens System the register is everything. Upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s. 340(1) of the National Land Code), that is, a title or an interest which is free from all adverse claims or encumbrances not noted on the register. I might as well mention that registration under the National Land Code is effected when a prescribed memorial of the dealing is made on the register document of the title under the hand and seal of the registering authority (*Mohammad Buyong v. Pemungut Hasil Tanah, Gombak & Ors* [1982] 2 MLJ 53).

[19] Plaintiff as the registered owner of the land is entitled to possession of the whole of the land. The defendant is not entitled and has no right to occupy any portion of the land without the consent of the plaintiff. Even if the defendant is asserting that a predecessor in title had consented to the defendant's occupation of a portion of the land, that would not bind the plaintiff as the new registered owner unless the interest of the defendant has been registered or endorsed on the title. Absent that the cause of action of the defendant is against the person who the defendant said has given it the consent to occupy the land or any portion of it. That does not derogate from the fact that the defendant is a trespasser *vis-a-vis* the plaintiff as registered owner. In *Cahaya Ideal (M) Sdn Bhd v. Orang-Orang Yang Mengenali Diri Sebagai 'Ponga' & Ors* [1999] 3 CLJ 257 p. 277, it was held as follows:

> Once the plaintiff became registered as the proprietor of the property, the title became indefeasible under s. 340 of the NLC and the plaintiff has a title which was free of all adverse claims or encumbrances not noted on the register.

[20] Apparently it emerged only at the trial, for it was not pleaded by the defendant in its defence, that the plaintiff's title is not indefeasible for non-compliance with s. 214A of the NLC. The importance of pleadings cannot be overemphasised. In *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665, the Federal Court at p. 679 underscores its importance as follows:

> It is a cardinal rule in civil litigation that the parties must abide by their pleadings ... In fact, the Court of Appeal itself has reiterated this in *Amanah Butler (M) Sdn Bhd v. Yoke Chee Wah* [1997] 2 CLJ 79 where Gopal Sri Ram JCA (as he then was) said:
>
> > It is trite law that a party is bound by its pleadings.

[21] I agree with learned counsel for the plaintiff Mr Rajindar Singh Veriah that he has been taken by surprise. Had the defendant asserted non-compliance with the approval of the Estate Land Board under s. 214A NLC, he would have asked the solicitors in charge of the transfer to testify as to whether the requirements of s. 214A NLC have been met. He would also have called the relevant officer from the land office on whether the title has been properly issued.

[22] Learned counsel Mr Chan Kok Keong for the defendant tried to prevail upon this court that once the point of illegality is raised at any stage of trial, then this court must take cognisance of it and that no court should be seen as affirming or approving an illegal act. He submitted that although the defendant did not specifically plead illegality, material evidence was led during the trial to prove the illegality of the plaintiff's title or interest in land. He cited the oft-quoted case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 where the principle was propounded as follows:

> Where there is no pleaded case of estoppels, but there is let in, without any objection, a body of evidence to support the plea, and argument is directed upon the point, it is the bounden duty of a court to consider the evidence and the submissions and come to a decision on the issue. It is no answer, in such circumstances, to say that the point was not pleaded.

A Although this point was never raised in the pleadings, this Court is entitled to take cognisance of the issue. In *Mohd Pancha Abdullah & Anor v. Tham Kut Cheong & Anor* [2011] 7 MLJ 382 at p. 405, His Lordship Abdul Aziz Rahim J (as he then was) said as follows:

> The law on illegality is that it need not be specifically pleaded.
B The court can take cognisance of the issue and the parties relying on it may make submissions on it at the end of the trial *if the facts supporting the evidence of illegality in the transaction is sufficiently adduced and tendered in court for consideration.* (emphasis added)

C **[23]** The Court of Appeal in *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494; [1996] 2 MLJ 141 at p. 146 put this point beyond a pale of a doubt when His Lordship Gopal Sri Ram JCA (as he then was) said:

> We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the
D court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it.

See also the case of *FKJV (M) Sdn Bhd v. Mode Circle Sdn Bhd & Other Cases* [2012] 1 LNS 1141; [2012] MLJU 751

E **[24]** He referred to the case of *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 CLJ 20; [1992] CLJ (Rep) 150; [1992] 1 MLJ 263 p 271 where it was observed as follows:

> Under s. 241A it is postulated that prior approval of the Estate Land
F Board must be obtained for the sale of Lot 849 ... Since these provisions were not complied with, and in view of the manifest prohibition against fragmentation of estate land as is implicitly stipulated therein, the transfer is accordingly null and void *ab initio*.

[25] Section 214A(10A)(a) provides that any person who transfers,
G conveys or disposes of any estate land in contravention of sub-s. (1) shall be guilty of an offence and shall be liable to imprisonment for a term not less than one year and not more than three years and to a fine not exceeding RM10,000.

[26] At any rate he who asserts must prove and so if the defendant is
H serious in its assertion he must call the relevant officer from the Estate Land Board to confirm that no approval has been obtained. This the defendant has failed to do. In *Seganom Sdn Bhd v. Samsudin Abu Hassan* it was held at p. 6 as follows:

> I 'He who asserts must prove.' Its legislative reinstatement is to be found in s. 101(1) of the Evidence Act 1950 ...

[27] Section 101 of the Evidence Act 1950 is clear and it states as follows: A

> 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove those facts exist.
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> B
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> 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[28] Section 3 of the Evidence Act 1950 provides as follows:

> A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. C

[29] It must be noted that before the court needs to take cognisance of an illegality sufficient evidence must be adduced to prove illegality. I would hold that the defendant has not discharged this burden and surely the court cannot be expected to act on the assertion of the defendant which was not pleaded and when raised was not supported by any shred of evidence other than a mere say-so by the defendant. I am not satisfied that illegality has been shown and that the land office had proceeded to issue the sub-divided title and to register it in the plaintiff's name in contravention of the NLC without the consent of the Estate Land Board. D E

[30] In any event that assertion is a non-starter for this court need not and would not go behind the title unless a frontal attack has been launched against it by the defendant by way of a counter-claim. As was held in *Wong Yew Kwan v. Wong Yu Ke & Anor* [2010] 2 CLJ 703 p. 712: F

> As for authority, I need go no further than *Teh Bee v. K Maruthamuthu* [1977] 1 LNS 134 FC, which supports the proposition that if the registered proprietor acquired his title unlawfully, that is to say, in breach of written law, he may nevertheless assert it against the whole world until proceedings are brought to remove him from the register. G

[31] Further at p. 713 it was held:

> The plaintiff brought an action against the defendant in the magistrate's court for vacant possession. In his defence, the defendant denied that the plaintiff was the registered proprietor of the land. He said that the State Authority had acted unlawfully in issuing the title to the plaintiff. He also said that the plaintiff's title was invalid because it had been obtained by fraud, misrepresentation and by unlawful means. He however did not file an action against the plaintiff and the State H I

A Authority claiming a declaration of invalidity and consequential orders. There was simply no frontal attack on the plaintiff's title. This proved fatal. Because, what remained was only the issue whether the plaintiff's name appeared on the register. It did. And on that ground she was entitled to succeed.

B [6] So too here. The plaintiffs (respondents before us) are the registered proprietors of the land in question. There is no frontal attack upon their title. They are therefore entitled to vacant possession of the land.

[32] In the present case the defendant has not raised any counter-claim C for a declaration that the said title of the plaintiff is invalid and it had not joined the State Authority as a party. It is more likely than not, an afterthought raised for the first time in the cross-examination of PW1.

[33] A closer scrutiny of s. 214A NLC as clarified by case law shows D that there is nothing wrong in entering into a conditional sale and purchase agreement involving the sale of a part of land being part of a larger piece of land to be subdivided with a separate title to be issued. Section 214A is set out below:

Section 214A. Control of transfer of estate land

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(1) Notwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as "the Board") established under F sub-section (3).

(2) The Registrar shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board.

G **[34]** This has to be read with s. 136 NLC which provides:

Section 136(1) of the NLC 1965

(1) No sub-division shall be approved by the State Director or, as the case may be, Land Administrator unless the following conditions have been satisfied - H

...

(b) that the sub-division would not be contrary to the provisions of any written law for the time being in force, and that any requirement imposed with respect thereto by or under any such I law have been complied with.

[35] The strategy adopted by the defendant has been tried in the case of Vellasamy *Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712 though to no avail. The court observed at p. 837 as follows:

> [385] In regard to the issue of s. 214A of the NLC that was not raised on the pleadings of any of the defendants but was suddenly put in through the back door at the submission stage before the High Court by MBF, I have this to say.
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> [386] MBF argued that the agreements between SPPKB and the sub-purchasers were in breach of s. 214A of the NLC and therefore illegal. Section 214A of the NLC enacts as follows:
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> …
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> [387] A close scrutiny of s. 214A of the NLC reveals that *it does not prohibit the making of contractual agreements of sale. What is required is this. That such sales, before they can be registered in the individual names of the buyers, have to obtain the statutory consent from the Estate Land Board. Indeed this is true in respect of all sales that require some form of consent from some relevant authority.*
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> [388] The rigmarole to comply with the provisions of s. 214A of the NLC would be as follows. Firstly, the parties have to enter into a sale agreement. Secondly, when the parties have completed all the mutual obligations under the contract, then they are ready to transfer the property. Thirdly, it is at this point of time, that the parties apply for the statutory consent. Fourthly, after obtaining the statutory consent, the land is duly transferred and registered in the name of the purchaser. However, a caveat must be incorporated. If and only if for some reason the statutory consent is refused, then the sale will fall through.
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> [389] Thus, as demonstrated **it is quite wrong to make a sweeping statement that s. 214A of the NLC bars contracts for the sale of an estate land.**
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> …
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> [392] *Both Batu Kawan Bhd v. Pentadbir Tanah Daerah Seberang Perai Selatan* [2002] 1 CLJ 633, FC; and *Rengamah Rengasamy v. Tai Yoke Lai & Anor* [1998] 1 CLJ 987, HC, sided the plaintiffs and these two cases laid down a singular principle of law and that would be this. **That s. 214A of the NLC is not a bar to agreements for the sale of land but rather it is only a bar to the registration of the transfer pursuant to the agreement.** (emphasis added)

[36] It had also been held before in *Rengamah Rengasamy v. Tai Yoke Lai & Anor* [1998] 1 CLJ 987 p. 998 as follows:

> In fact one of the particulars required to be filled in the prescribed form is the name and address of the intended transferee or purchaser. Thus the existence of an intended purchaser is a pre-requisite for making an application for approval to the Estate Land Board. Before an intended purchaser can come into existence there must have been negotiations and agreement between him and the proprietor on the price and other relevant terms. Surely a record of the negotiations requires to be kept to facilitate completion of the agreement when the appropriate time comes. This can be best achieved by the execution of a provisional or conditional agreement between them. This, in my opinion, is contemplated by s. 214A(4). That is precisely what the plaintiff did. Clause 3 and the addendum to the agreement depict the conditional nature of the agreement and the effect of failure to obtain the required consent in crystalline terms. This does not violate s. 214A(1).

[37] This is a fit case in the absence of evidence to the contrary to invoke s. 114(e) of the Evidence Act 1950 which reads as follows:

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume-
>
> (e) that judicial and **official acts have been regularly performed**; (emphasis added)

[38] I would gladly follow the approach taken in *Hizran Enterprise & Anor v. Kumpulan Sua Betong Sdn Bhd* [1994] 3 CLJ 622 p. 624 as follows:

> The land in the present case had already been subdivided on the request of the defendant ... Further, I am of the view that when the relevant authority approved the sub-division it is deemed that the Estate Land Board had given its approval by virtue of s. 136(1) of the National Land Code where it states:
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> …
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> From this it appears to me that *when the sub-division were approved and separate titles had been issued by the proper authority it is deemed that all the requirements and conditions of the National Land Code had been complied with and this includes the approval of the Estate Land Board in respect of estate land.*

> Though the defendant argued that no application was ever made by anyone to the Estate Land Board for the sale, the defendant did not dispute the sub-division had been completed which means that the requirements under s. 136(1) had been complied with. (emphasis added)

[39] Indeed from the sale and purchase agreement dated 26 February 2007 one can see that this land of about 20 acres have been carved out from a bigger piece of about 502 acres held under Geran 5668, Lot 45.1 Mukim Ulu Telom, District Cameron Highlands, in the State of Pahang. Recital (C) of the agreement reads:

> The application to subdivide the area measuring 20 acres to be subdivided from and carved out of the Land as more particularly set out and demarcated in Schedule A attached herein (hereinafter referred to as the "Subdivided Land") has been presented to the relevant land office.

[40] Taking into consideration the evidence adduced and in the absence of evidence from the defendant as it chose to submit a no case to answer, I held that the plaintiff has proved on the balance of probabilities that it is the registered owner of the land and that its title is unassailable and indefeasible against the whole world and further that the plaintiff is entitled to possession of the land.

Whether The Plaintiff Has Proved On The Balance Of Probabilities That The Defendant Has Trespassed On To The Plaintiff's Land

[41] The plaintiff through PW1 gave evidence that the photographs at pp. 16-21 of B showed the encroachment of the defendant onto the plaintiff's land. The photographs are from the surveyor's report. The plaintiff's witness PW1 has also demarcated out in red and shaded it the portion of the land occupied by the defendant.

[42] The defence of the defendant is that one Mr Ong Eng Chin had allowed it to occupy the land. Who Mr Ong Eng Chin is and what was the rights over the land that he had which empowers him to give the consent was never adduced in evidence at all. The defendant cannot in the absence of evidence to refute the plaintiff's claim feign ignorance and pretended that it had not encroach onto the plaintiff's land illegally. All the defendant needs to do is to go into the witness stand to show the court that the plaintiff has been sincerely and sadly mistaken where the so-called encroachment is concerned and the reasons there for; that indeed the portion occupied by the defendant was not on the plaintiff's land. Then and only then perhaps the defendant might have a basis to say that the plaintiff has to call its expert surveyor to prove as it were

A the disputed portion which the plaintiff said is on the plaintiff's land. In the absence of evidence to the contrary as the defendant chose not to call any witnesses and as I find that the evidence of the plaintiff is not inherently incredible, this would be a fit and proper case for me to invoke s. 114(g) of the Evidence Act 1950. It reads:

B

> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> C Illustration -
>
> …
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

D **[43]** The Federal Court speaking through His Lordship Gopal Sri Ram FCJ in *Takako Sakoa v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751 at p. 759 has given us a helpful guide to follow when there is no evidence forthcoming from a defendant:

> E In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. **In the first place, the evidence given by the appellant ought to have been presumed to be true.** As Elphinstone CJ said in *Wasakah Singh v. Bachan Singh* (1931) 1 MC 125 at p 128:
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> F
>
> > If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this
> G stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the
> H appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the
> I figures. And her evidence does not appear to be either inherently

incredible or inherently improbable. In these **circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent** going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. **Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference.** See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar Shaari & Anor (suing as Administrators of the Estate of Shofiah Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: 'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it. (emphasis added)

[44] As was aptly observed by His Lordship Suriyadi JCA in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81:

[32] ... It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, **the effect is also that all the evidence led by the plaintiff must be assumed to be true.** This proposition of law was succinctly said in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p. 712:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true. (emphasis added)

[45] Neither can the defendant rely on its pleading in its defence to refute the plaintiff's claim. Pleadings are not a substitute for adducing evidence as highlighted in *Ng Ben Thong & 2 Ors v. Krishnan Arumugam* [1997] 1 LNS 85; [1998] 5 MLJ 579 at p. 583 where it was held that:

I am asked by the defence to rely on its pleadings and to dismiss this case. *The defendant must realise that pleadings is not evidence. It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in the absence of*

evidence being led in court, similarly evidence cannot be led outside the pleadings. Pleadings and evidence become the heart and soul of a case. They complement each other.

In the case before me for reasons best known to himself, the defendant did not turn up in court. An opportunity was given when the case was adjourned, before his counsel commenced cross-examination. Both counsels went to the *locus in quo*. Surely if the defendant was interested in defending this case, he would have at least seen his counsel and recognised him and could have attended court the next day. *In the circumstances, the defendant's pleadings, namely his defence, remains as bare allegations, unsubstantiated by the live-giving evidence that must of necessity course through the veins of his case to sustain in. Bereft of any evidence, the defendant's case was a non-starter.* On the other hand, the case for the plaintiffs was fully substantiated by the evidence of both PW1 and PW2. Each of them gave their evidence very candidly and denied the averments of the defence. I have no reasons to doubt their evidence. (emphasis added)

[46] The defendant contended that it submitted no case to answer and had elected to forfeit its right to tender any evidence in court to defend its case, and would instead rely on the evidence adduced by the plaintiff to maintain that the plaintiff has not proved its case on a balance of probabilities as the evidence adduced was so unsatisfactory or unreliable that the plaintiff's burden of proving its case has not been discharged. It cited *U N Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223; [1980] 1 MLJ 4 as support for the proposition.

[47] However taking the uncontradicted evidence of PW1 as a whole I am no where convinced that the plaintiff's evidence is so unsatisfactory or unreliable such that even on the balance of probabilities the plaintiff has not discharged its burden of proof. All that the defendant needs to do is for its representative to go into the witness stand, take the oath and tell the truth. The fact that none of the witnesses of the defendant were prepared to do that would constrain the court to invoke s. 114(g) Evidence Act 1950. Either the defendant has no helpful evidence to refute and contradict the plaintiff's assertion or that the defendant knew as a matter of fact of its trespass onto the plaintiff's land. In fact the pleading in its defence is shifting rather than sure. If it is not in unlawful occupation why sought to take coverage under a consent of a person one Mr Ong Eng Chin, not called as a witness without even pleading the relationship of that person to the land. If indeed the defendant is serious in its assertion that the plaintiff is not the registered owner of the land, an official search would seal the matter. If it still believes that nevertheless its occupation is not onto the plaintiff's land a survey report

would settle the issue. There are no two ways about it. It would be opportune to refer to the observation in *Syarikat Pengangkutan Kesejahteraan Sdn Bhd & Anor v. Tenaga Nasional Bhd; Ng Ah Boon (Third Party)* [2010] 1 CLJ 625 as follows:

> [47] In my judgment, as the defendant is not the registered owner of the land, the defendant's occupation of the plaintiffs' land (ie, the disputed area) is, *prima facie*, unlawful *vis-a-vis* the plaintiffs. The first plaintiff is the registered owner of the land including the disputed area. The second plaintiff is a person who had purchased the land from the first plaintiff. The second plaintiff, therefore, has a beneficial interest in the land. *Prima facie*, the defendant is a trespasser. The defendant had never obtained the permission of the plaintiffs to occupy the disputed area. The defendant had arrogated to itself the right to occupy the disputed area supposedly by virtue of s. 11(2) of the Act. It is, thus, for the defendant to justify their occupation of the disputed area.

[48] In the circumstances I am constrained to hold that the plaintiff has proved on a balance of probabilities that the defendant has trespassed onto the plaintiff's land.

Whether In The Circumstances Of The Case The Plaintiff Is Entitled To Exemplary Damages

[49] The circumstances that would attract an award of exemplary damages have been set out in the Court of Appeal case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 6 MLJ 289 at p. 316 by His Lordship Gopal Sri Ram JCA as follows:

> 66 When as a matter of law exemplary or aggravated damages may be awarded was settled by the speech of Lord Devlin in *Rookes v. Barnard* [1964] AC 1129 which was re-affirmed by the House in *Cassell v. Broome* [1972] AC 1027. He said that there were two categories in which exemplary damages may be awarded and three considerations that operate in the making of the award. It is best that I reproduce the whole of the passage in which Lord Devlin deals with the point. This is what he said:
>
> > (T) here are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law, and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal. I propose to state what these two categories are; and I propose also to state three general considerations which, in my opinion, should always be borne in mind when awards of exemplary damages are being made. I am well aware that what I am about to say will, if accepted, impose

limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range. I shall not therefore conclude what I have to say on the general principles of law without returning to the authorities and making it clear to what extent I have rejected the guidance which they may be said to afford.

The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category - I say this with particular reference to the facts of this case - to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man bullying a small man and very likely the bullying will be a source of humiliation that makes the case one for aggravated damages, but it is not in my opinion punishable by damages.

Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. I have quoted the *dictum* of Erie CJ, in *Bell v. Midland Ry Co* (1861) 10 CBNS at p. 304. Maule J, in *Williams v. Currie* (1845) 1 CB at p. 848, suggests the same thing; and so does Martin B, in an *obiter dictum* in *Crouch v. Great Northern Ry* Co (1856) 11 Exch 742 at p. 759. It is a factor also that is taken into account in damages for libel; one man should not be allowed to sell another man's reputation for profit. *Where a defendant with a cynical disregard for a plaintiffs' rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk, it is necessary for the law to show that it cannot be broken with impunity.* This category is not confined to moneymaking in the strict sense. It extends to cases in **which the defendant is seeking to gain at the expense of the plaintiff some object** - perhaps some property which he covets - which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is **necessary to teach a wrongdoer that tort does not pay.**

> To these two categories, which are established as part of the common law, there must of course be added any category in which exemplary damages are expressly authorised by statute.
>
> I wish now to express three considerations which I think should always be borne in mind when awards of exemplary damages are being considered. First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence.
>
> Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty, as in the *Wilkes* case (1763) Lofft 1, can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint. It may even be that the House may find it necessary to follow the precedent it set for itself in *Benham v. Gambling* [1941] AC 157, and place some arbitrary limit on awards of damages that are made by way of punishment.
>
> Exhortations to be moderate may not be enough. Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant. (emphasis added.)

[50] Both the first and second categories referred to by Lord Devlin above are relevant to our consideration. The continued occupation of the portion of the land by the defendant from 2009 until now is in essence a deliberate attempt on the part of the defendant to deprive the plaintiff of his property, a right guaranteed under art. 13 of the Federal Constitution. This was highlighted in *Syarikat Pengangkutan Kesejahteraan Sdn Bhd & Anor v. Tenaga Nasional Bhd; Ng Ah Boon (Third Party)* [2010] 1 CLJ 625 p. 647 where it was said:

> In the light of the whole circumstances, for this court to give legal recognition to the occupation of the plaintiffs' land by the defendant in the present case, would not only be contrary to the provisions of the Act, in particular ss. 11 and 16, but would also be a violation of art. 13 cl. (1) of the Federal Constitution which provides that no person shall be deprived of his property save in accordance with the law.

[51] The defendant could have easily ascertained whose land it is it was occupying especially after receiving the two formal notices in 2010 to vacate the land. It is a case of the defendant ignoring the plaintiff's claim knowing well that because of the size and spread of the encroachment, the plaintiff would not dare to use reasonable force to forcibly evict them and that a court action would take time. In the meanwhile the defendant was bent on reaping maximum use and profits from his farming activities on the plaintiff's land. The plaintiff could not use the part of the land encroached for four years already and that it was also difficult to sell when prospective purchasers know of the illegal encroachment.

[52] At the end of the day, the conduct of the defendant in refusing to testify showed that it was not serious in asserting its defence and in raising illegality. The irreversible inference is that the defendant intends to stay for as long as it can unless upon pain of a forcible execution process for vacant possession and to deprive the plaintiff of the legitimate use of its land and more than that to profit from the land for free.

[53] Such brazen conduct of the defendant is punishable conduct that should be reflected in an award of exemplary damages.

Pronouncement

[54] I therefore made an order for vacant possession of the said land and for general and exemplary damages to be assessed by the SAR. Interest shall be at 5% per annum from the date of filing of the writ.

[55] After hearing submissions from both counsel, I ordered costs of RM30,000 to be paid by the defendant to the plaintiff.